ESSAY

WHAT'S GONE WRONG WITH LEGAL THEORY?: THE THREE FACES OF OUR SPLIT PERSONALITY

R. George Wright[*]

What has gone wrong with legal theory? Professor R. George Wright answers that question by explaining the "split" that has occurred in most works of legal theory. Three forms of these "dualisms" have appeared in various works, and Wright shows through example how unworkable they are. The three forms of this split legal personality show an inclination to reject any claims of objectivity in legal thought. Wright claims that as a result, a heavy price is paid by certain groups in society.

"It's hard to explain our Heckle and Jeckle performance."[1]

Mark Jackson

INTRODUCTION

These days, most serious works of legal theory express, in one way or another, a splitting of the legal personality. Sometimes, the splitting or ambivalence is conscious. Consider, for example, some of the concluding thoughts from a recent book by Louis Michael Seidman and Mark Tushnet:

> What is ultimately required is a kind of dual consciousness. . . .
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> Constitutionalists cannot simply forget their hard-won knowledge of the emptiness of constitutional arguments. Yet

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* Professor of Law, Cumberland School of Law, Samford University. Gratitude is hereby expressed, for their counsel, to Debby Denno, Michael Perry, Steve Smith, Mark Tushnet, and Lloyd Weinreb.

1. *Quoted in* Shaun Powell, *Last Stand for Knick Duo?*, MIAMI HERALD, Dec. 11, 1990, at 2D.

> they must act *as if* the arguments were not empty if they are to energize our politics and give meaning and purpose to our public lives. They must somehow authentically admire the emperor's new clothes, all the while knowing on a different level of consciousness that he is most assuredly naked.[2]

Seidman and Tushnet are hardly alone in this sort of deep ambivalence about our legal system.[3] The project of this essay is to put some structure on the awkward dualisms at the heart of contemporary legal theory, and to suggest a remedy.

As it happens, these dualisms, amounting to a split legal personality,[4] take three separate forms. Let us briefly consider the three forms in the abstract, and then move to the level of concrete example. The first form of awkward legal dualism involves our inventing an unworkable distinction, or grossly exaggerating a real

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2. LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 200 (1996).

3. In his recent book, Professor Steve Smith concludes that classical ideas such as that of respect for persons or human flourishing are ultimately empty, while still feeling the enormous gravitational pull of these ideas. *See* STEVEN D. SMITH, THE CONSTITUTION AND THE PRIDE OF REASON (1998). Consider Duncan Kennedy's recent characterization of "American critical legalism" as "an odd combination of utter faith and utter distrust in law." DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 73 (1997). Peter de Marneffe raises the possibility "that the conscientious use of legal theories is likely to lead judges to incorrect decisions." Peter de Marneffe, *But Does Theory Lead to Better Legal Decisions?: Response to Ronald Dworkin's* In Praise of Theory, 29 ARIZ. ST. L.J. 427, 427 (1997). Ronald Dworkin notes that theory, at least in his narrow sense of the term, "seems abstract, metaphysical, and wholly out of place when there is real work to be done," yet theory is inevitable and indispensable in deciding cases. Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 354-55 (1997). For purposes of this paper, we will not assume all legal theory to be so abstract, general, unempirical, and unconcerned about legal and social institutional issues as to limit its own usefulness. *See also* J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1785 (1994) (criticizing Professor Philip Bobbitt as attempting unsatisfactorily to distinguish "natural law" from the "ethical" in judging); Philip Bobbitt, *The Third Man*, 63 U. COLO. L. REV. 415, 415 (1992) (opining that Professor Sanford Levinson is simultaneously "captivated by the notion of the theoretical" and "skeptical of theory as a guide for action"); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1738 (1995) (discussing both the advantages and disadvantages of judicial resort to generalized theories); Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 293 (1993) (reviewing PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991)) ("Twentieth century philosophy discredits many of the epistemological assumptions of natural law and positivism, of formalism and realism, but it does not replace those schools . . . .").

4. Our choice of terminology is undeterred by the fact that Stedman's Medical Dictionary makes no reference to a "split" personality. Stedman's does refer to dual personality as well as to multiple personality, but on the understanding that none of the alternate identities is consciously aware of the existence of the others. STEDMAN'S MEDICAL DICTIONARY 1172-73 (25th ed. 1990). In many instances, modern legal theorists are keenly aware of the awkward "splits" in their thinking.

distinction. Here, we are consciously aware that we are using both sides of a distinction. We may not, however, recognize its unworkability or its exaggerated character. The deep explanation for this sort of untenable dualism lies in our wish to retain both of two highly desired but conflicting values. The invented or exaggerated dualism allows us for a time to avoid admitting the tradeoff between those two conflicting values, or to avoid having to find other ways of reconciling those values.

The second form of legal dualism does not involve consciously using both sides of a distinction at the same time. The second dualism instead takes the form of focusing on one or more ideas and defining them narrowly or nonstandardly, but in a way that still trades upon the power and rhetorical force of broader, more standard definitions of the same terms. There is thus a conscious desire to disavow, and perhaps an unconscious desire to continue to rely upon, traditional meanings and associations of one's newly redefined legal terminology. One both does, and does not, entirely give up the standard meanings of one's terminology.

The third form of legal dualism, finally, involves a complete abandonment to dualism. Dualism here is assumed to be an ultimate and unimprovable state of affairs. It amounts to what is often called relativism. No moral or legal value can transcend the perspective of any particular group. Thus, there may be as many ultimate moral or legal schemes as there are group perspectives. Here, the split legal personality simply divides into two or more separate personalities. The two separate personalities, now embodied in separate groups, may interact and affect each other. They may or may not find some degree of common ground. No group or person involved may accept the label of relativism, but relativism in a broad sense describes the situation.

It is not hard to think of important examples of each of these three forms of the split legal personality. Take the first form of legal dualism above, that of "exaggerated distinction" dualism. Parts I and II below work through an example that has long been crucial to moral philosophers, but which should also be recognized as utterly central to the work of many modern legal theorists as well. In particular, we will explore the legal use of a distinction commonly but uninformatively known as that between the right and the good. This distinction argues for a significant moral or legal difference between two sets of abstract ideas. One set includes the idea of the right in the sense of acting rightly. This set also includes the ideas of duty, obligation, ought-to-do, and, crucially, the idea of justice. The other set includes ideas such as the good, including the good life, the valued and the valuable, human flourishing, human fulfillment, the idea of what ought-to-be, and interests and purposes in general.

As we shall see in Parts I and II, many writers have invested heavily in this distinction, which for the sake of tradition and con-

venience, though certainly not clarity, we must continue to refer to as that between the right and the good. It has been common for philosophers and, increasingly, legal theorists to exaggerate and crucially rely on this distinction. Writers have competed, and continue to compete, to show that either the right or the good is "prior to" or more basic than the other, and to found their approach to law or morality on such a supposed priority. Either the right is dependent upon and defined in terms of the good, or vice versa.

Of late, it has also become popular to try to argue as well that the right is somehow more "objective," and the good more "subjective." Whatever their priority, it is commonly thought that the good is more subjective than the right. By this is meant, roughly, that questions of the right and of justice, as opposed to the good, may have answers that are more "real," somehow more naturally inescapable, and less dependent upon the moral evaluator's own preferences as to how the moral inquiry should come out. In contrast, it is thought, questions of the good life or of human interests have answers that are less "real," and more dependent upon ultimately arbitrary preferences, tastes, or group membership. Thus, on this view it is thought, for example, that the good life for each person is largely a matter of the individual's own preference or discretion. The right, perhaps in the form of what social justice requires, is in contrast thought to be less a matter of such subjective discretion.

The payoff for drawing this distinction, it is supposed, is that we can then have the best of both objectivism and subjectivism. Certain horrifying behaviors can be legally and morally ruled out as "really" or objectively wrong, but most, if not all, legal paternalism on the basis of lifestyle and choice of the good life can be blocked on the theory that the good is subjective.

This indeed sounds splendid. To sum up the results of Part I and especially Part II, however, none of this works, at any stage. If we want, as we should, to block government paternalism in the realm of the good life, we can and must find other ways. In particular, we can summon the courage to say that a rich variety of ways of living, depending upon individual choice, is objectively justified and required by justice itself.

Part III takes up the second form of legal dualism, in which the legal theorist consistently endorses unusually narrow understandings of crucial legal and moral terms, while unconsciously drawing upon or benefiting from the long established, more ambitious, broader understandings he repudiates. This Part focuses in particular on the important recent work on euthanasia, assisted suicide, and the idea of objectivity itself by the preeminent legal theorist Ronald Dworkin. We shall see that Professor Dworkin is perfectly consistent in how he chooses to define key terms, and in

the political or constitutional results he reaches.[5] But this sort of consistency is no guarantee of a deeper single-mindedness. If the Prince of Denmark had published his thoughts, he might have written that he intended the death of his step-father. This, however, would not reflect a deeper single-mindedness in *Hamlet*.[6] Professor Dworkin can consistently reject standard meanings of familiar terms, but there is no easy way to also reject the rich historical associations of those familiar terms as well. Certain associations of familiar moral and legal terms are inevitable. These associations—whether Dworkin repudiates them or not—inevitably add to the apparent gravity, power, and rhetorical force of his legal argument.

Part IV addresses the third and final form of legal dualism, in which subjectivism of value takes the form of an irreducible group relativism. Here, the split in the legal personality becomes a full separation and divorce. Group relativism as to moral and legal matters today clearly exerts a powerful attraction. We shall see, however, that at least in the important context of the law and morality of rape, the collective split personality of group relativism is largely without appeal. A world in which many men think one set of thoughts about the scope and morality of date rape and many women think another is far from ideal. If the beliefs of these men and women about date rape are thought to be merely different, and not also genuinely better and worse, women will inevitably wind up paying a large and unnecessary price. A civilized society should be able to justifiedly condemn date rape, broadly understood, and not merely report that many women, as opposed to many men, oppose date rape solely from a group-based perspective.

Putting our treatments of the three forms of the split legal personality together, a consistent, unifying theme emerges. This is that the popular inclination not merely to be suspicious of claims to objectivity, but to reject even the aspiration to objectivity itself, turns out to be unattractive. We can and should uphold our most noble legal ideals because they are genuinely noble, and not merely because they happen to be ours. There are certainly costs and risks in our continuing to seek genuinely, objectively better principles in law and morality. But we are likely to be worse off if we emphasize subjectivism in any of the ways built into the three forms of legal dualism introduced above. In reality, much of the price of rejecting the ideal of objectivity is paid by groups without much social power.

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5. For a discussion of Porfessor Dworkin and his ideas, see *infra* note 81 and accompanying text.

6. As observed in the title chosen by a fellow Dane, SOREN KIERKEGAARD, PURITY OF HEART IS TO WILL ONE THING (Douglas V. Steere trans., Harper & Bros. 1948) (1847). Recall as well the quite unnecessary prefatory language introducing Olivier's movie version of *Hamlet*: "This is the story of a man who could not make up his mind." HAMLET (Paramount 1948).

The popular suspicion of the goal of objectivity is generally not in the interests of the disadvantaged and oppressed.

I. SPLITTING THE LEGAL PERSONALITY: THE RIGHT AND THE GOOD FOR LEGAL PURPOSES

Judges, lawyers, and even most legal academics do not often rely explicitly on a literal distinction between the right and the good. Of course, the idea of doing the right thing plays a central role in our legal system.[7] Our broadly liberal legal system may seem more interested in rights in the sense of, say, First Amendment claims than in "right" in the sense of the legally required thing to do. On the other hand, we may want legal actors, such as judges, to aim for right answers when they are available,[8] even though we do not expect a broadly liberal legal regime to focus intensely on what it is right or wrong for private parties to do.[9]

In the relevant sense, that of doing the legally right thing, the right is legally crucial. In the sense with which we are concerned, the right is linked with what is just, or with what justice requires. Surely it would be odd to say that our legal system ought take no thought for justice. In our sense, the right is closely linked with justice, with doing one's duty or fulfilling one's obligations, and with what one ought to do.[10] To say that the right is unimportant in the law would thus be to say that justice and injustice are unimportant in the law.

Good, in contrast to the right, is linked with purposes and interests, ends and goals, fulfillment, values and the valuable, and with what ought to be.[11] The law today may speak less confidently and explicitly of what is good or valuable for persons. But the law clearly relies constantly on related ideas, such as that of compelling governmental interests,[12] and the fundamental interests[13] or liberty

7. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996); H.L.A. HART, THE CONCEPT OF LAW (1961); WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1919).

8. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977) (developing his well-known "right answers" thesis).

9. *Cf. id.* at 188-89 (noting the distinction between having a right to act in a particular way and that act's being the right thing to do).

10. For elaboration, see, for example, Elizabeth M. Pybus, *False Dichotomies: Right and Good*, 58 PHIL. 19, 20 (1983).

11. *See* Anne MacLean, *Right and Good: False Dichotomy?*, 60 PHIL. 129, 129 (1985); Pybus, *supra* note 10, at 20. Good in this sense is often linked with the idea of the good life, as in Justice Brennan's dissent in *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

12. *See, e.g.*, Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988).

13. *See, e.g.*, Washington v. Glucksberg, 117 S. Ct. 2258, 2268 (1997).

interests[14] of persons. For good reasons, the law is reluctant to choose among possible ways of flourishing or living well, at least within limits. It is also true, however, that the law—even international law—commonly rejects at least overt torture as incompatible with human flourishing and the good life, even if the law does so under the rubric of human rights.

The possible distinction between the right and the good has, in contrast, been consciously and explicitly central to many well-regarded twentieth century political and moral philosophers. John Rawls, for example, has consistently treated a distinction between the right and the good as fundamental to his approach to justice and to political liberalism.[15] More broadly, it has recently been argued that "[i]t is a commonplace among modern moral philosophers that the good and the right are the central and most important moral concepts."[16]

Some sort of distinction between the right and the good thus seems initially promising for legal purposes. Lawyers and judges may not commonly refer explicitly to a distinction between the right and the good. They do refer often to justice, to legal duties, to interests, and occasionally even to values.[17] The philosophers seem to think that an explicit right versus good distinction is crucial, but practicing lawyers and judges do not appear to agree. There are two ways to explain why the law does not seem to rely explicitly on a distinction between the right and the good. It may well be that the law actually does rely on the right-good distinction, but only in an implicit, disguised form, using different concepts or different terminology. The other possibility is that the law often believes that the right-good distinction really does not have much to offer. We have seen, for example, that justice and the right belong on one side of this divide, and interests of all sorts, along with the human good, on

14. *See, e.g.*, Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

15. JOHN RAWLS, POLITICAL LIBERALISM 173 (1993); JOHN RAWLS, A THEORY OF JUSTICE 31-32 (1971); John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 251, 251 (1988); *see also* J.L.A. Garcia, *The Right and the Good*, 21 PHILOSOPHIA 235, 235 (1992) (noting the centrality of the right-good distinction in the work of Rawls).

16. Garcia, *supra* note 15, at 235; *see also* Lawrence C. Becker, *Good Lives: Prolegomena*, 9 SOC. PHIL. & POL'Y 15, 22 (1992) (assuming that a moral theory will either define the right in terms of some quantity of the good, or will somehow define the right in such a way as to render it at least partially independent of the good).

17. As to the latter, see *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) (plurality opinion) ("The Constitution serves human values. . . ."). For a reference to the idea of "the good life" that is vaguely skeptical at some, if not all levels, see Justice Brennan's opinion in *Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting).

the other.[18] But the law sometimes seeks justice through fundamental rights and fundamental interests and uses these latter ideas, in practice, as synonyms.[19] Which is racial discrimination, a matter of injustice and failure to act rightly, or else, on the side of the good, a suppression of human potential and a denial of human fulfillment? Which of these two approaches to racial discrimination is more basic than the other?

We will explore below how the legal system actually attempts to rely on some version of the general right versus good distinction. First, however, we should explore some reasons for skepticism about the scope and the real usefulness, in philosophy and in the law, of this distinction. Despite the widespread enthusiasm among leading modern philosophers for distinguishing the right from the good, the distinction is actually of very limited scope and value. Worse, the distinction, however formulated, may lead the law into very serious errors.

Philosophers may think highly of the right-good distinction. Let us notice, however, that ordinary speakers do not consistently adhere to any such distinction. Popular use of the terms "right" and "good" "in fact is rather indiscriminate."[20] Thus even a few philosophers have concluded that, for example, "it does not matter for ordinary purposes whether we speak of 'right' or 'good' conduct, 'wrong' or 'bad' motives,"[21] or that there is "no interesting difference between an action's being morally wrong and its being morally evil."[22]

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18. For a discussion of this dichotomy, see *supra* notes 10-11 and accompanying text.

19. Note the lack of any systematic distinction between constitutionally fundamental interests and constitutionally fundamental rights in, for example, *Glucksberg*, 117 S. Ct. at 2267-68; *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); and *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973). Of course, not every liberty interest amounts to a constitutionally protected fundamental right. *See, e.g., Cruzan*, 497 U.S. at 279. But interests recognized as constitutionally fundamental are typically treated as constitutionally fundamental rights. *See, e.g., Rodriguez*, 411 U.S. at 29-37.

20. Charles Larmore, *The Right and the Good*, 20 PHILOSOPHIA 15, 15 (1990); *see also* RICHARD B. BRANDT, A THEORY OF THE GOOD AND THE RIGHT 7 (1979) ("Even if linguistic intuitions pointed to more precise paraphrases of normative terminology than they actually do, one would not want to rely on them for guidance in normative reflection. For language might well embody confusing distinctions, or fail to make distinctions it is important to make.").

21. HENRY SIDGWICK, OUTLINES OF THE HISTORY OF ETHICS 6 (Hackett Publ'g 1988) (1902); *see also* CHARLES L. STEVENSON, ETHICS AND LANGUAGE 97 (1944) ("Certain theorists are accustomed to make a sharp distinction between 'good' and 'right,' as though the terms involved quite disparate problems of analysis. The present writer can find little ground for such a distinction, either in common usage or elsewhere.").

22. Garcia, *supra* note 15, at 242; *see also id.* at 241 ("[W]e should reject the thesis that moral rightness has an entirely different kind of basis from that of moral goodness.").

Of course, our language does set limits to the literal interchangeability of "right" and "good." We might say, for example, that someone is a good person, but we would not say that the same individual is a "right" person.[23] This hardly shows, however, that there is no relationship between being a good person and generally trying to do the right thing. It may well be that our uses of "right" and "good" differ in other ways. For example, it is probably more common to think of rightness when we think of acts, and of goodness when we think of states of affairs or outcomes of acts.[24] We say that a given choice was the right thing to do, and that it is good that things turned out as they did. On the other hand, we also talk of setting things right, of things being rightly ordered or rightly arranged, and of something being a good thing to do. This does not seem to vary depending on whether the context is legal or not.

Nor does the degree of wrongness of an act always track the harmfulness or badness of its consequences. Thus the right, or its absence, need not always track the good, or its absence. Victims can die as a result of justifiable, excusable, negligent, or intentional acts, without the degree of deadness of the victim or most other consequences varying much in their badness. This does not mean that the harmfulness or bad consequences of murder are never worse than those of a merely negligent homicide.[25] They may well typically be worse. But the wrongness of a killing does not always precisely parallel the badness of its consequences. Common sense suggests, however imprecisely, that deliberate murder is much more wrong than, say, an excusable or accidental killing. It may be that the harms or bad consequences of a deliberate murder are also typically worse than those of a mere excusable killing. But there seems to be a bigger difference between the wrongness of deliberate murder and of excusable killing than there is between the harmfulness, to any affected party, of deliberate murder and excusable killing. The bad consequences of a contract killing and of an accidental killing may, to the victim and her loved ones, be rather similar. The difference in the moral and legal wrongfulness of these two forms of killing seems typically greater.

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23. *See* STEVENSON, *supra* note 21, at 97.

24. *See* JOHN BROOME, WEIGHING GOODS: EQUALITY, UNCERTAINTY AND TIME 3 (1991) (but then going on to reject the distinction between the nature of an act and all of its consequences); *see also* Michael Stocker, *Rightness and Goodness: Is There a Difference?*, 10 AM. PHIL. Q. 87, 87 (1973) ("[R]ightness and goodness are the same thing so far as ethical considerations are concerned; and if there is any difference between them, this has to do with the different ontological status of what they evaluate: acts or states of affairs."); *cf.* W.D. ROSS, THE RIGHT AND THE GOOD 7, 156 (Oxford Univ. Press 1946) (1930) (describing right and wrong as referring to acts done, and good and bad to the underlying motive).

25. *See* Stocker, *supra* note 24, at 95 ("That I intentionally or knowingly injure you is, itself, bad; bad, that is, apart from the mere injury.").

There are thus some sorts of differences between the right and the good, but we already have some grounds to suspect that those differences may be limited to particular purposes and contexts. We have no grounds to believe that the right and the good are somehow of different statuses or degrees of objectivity.[26] But if neither is more "solid" or more real than the other, should we nonetheless say that one is logically prior to the other?

Logical priority means roughly that the ideas of the right and the good do not operate on the same level. The one idea grounds, justifies, gives rise to, or limits and constrains the other more so than vice versa. If someone defines the right in terms of the good, for example—say, that the right thing to do is whatever produces the best consequences—one has implied that the right is more dependent upon the good than the opposite, and that the good is logically prior to the right.

The logical priority of the good to the right, or of the right to the good, has frequently been thought crucial. John Rawls's theory is merely the current leading example in this regard. Rawls acknowledges that the right and the good are both necessary and that they are indeed complementary. But for Rawls, "[t]he idea of the priority of right is an essential element in . . . 'political liberalism' and it has a central role in justice as fairness."[27] Rawls goes on to elaborate:

> The principles of right, and so of justice, put limits on which satisfactions have value; they impose restrictions on what are reasonable conceptions of one's good. . . . [I]n justice as fairness the concept of the right is prior to that of the good. A just social system defines the scope within which individuals must develop their aims. . . . [I]nterests requiring the violation of justice have no value.[28]

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26. *Cf.* Garcia, *supra* note 15, at 241 ("[W]e should reject the thesis that moral rightness has an entirely different kind of basis from that of moral goodness.").

27. JOHN RAWLS, POLITICAL LIBERALISM 173 (1993). On the importance of this question, see Will Kymlicka, *Rawls on Teleology and Deontology*, 17 PHIL. & PUB. AFF. 173, 173 (1988) ("The question of whether the right or the good is prior is now seen as a central dividing point for contemporary political theories.").

28. JOHN RAWLS, A THEORY OF JUSTICE 31 (1971). Note that Rawls seems to want to put "value" on the side of justice and the right. But this merely illustrates the limited scope and value of the overall distinction. It would be just as easy to link judgments of value with judgments as to what is good or what is in someone's interests. Value would then appear on the side of the good. Rawls then goes on to conclude that "[t]his priority of the right over the good in justice as fairness turns out to be a central feature of the conception." *Id.* at 31-32. Will Kymlicka among others finds this alleged priority misleading. Kymlicka argues that "Rawls treats the right as a spelling-out of the requirement that each person's good be given equal consideration." Kymlicka, *supra* note 27, at 190.

Rawls thus argues that the right is prior to the good and that this is important. Other modern philosophers have argued for a similar priority.[29] Often, this priority is argued for on the grounds that merely producing the best possible consequences may result in unfairness or injustice to particular persons.[30] We would not want to convict an innocent defendant merely to slightly enhance the overall net balance of good in the world. Often, it is argued that acts can be right apart from their consequences.[31] These sorts of arguments, however, really do not establish the priority of the right to the good.

Suppose, for example, that convicting a defendant pays off nicely in terms of good consequences, but is unfair to the scapegoat defendant. Why can't we simply decide that unfairness to an innocent defendant counts as a very bad consequence indeed, perhaps sufficient to categorically trump or outweigh the good consequences of the act? Can unfairness really be separated from all of the consequences, in a broad sense, of the unfair decision? Even the effect on the character of the decisionmaker could count as a consequence. The wrongness of the unjust conviction could then be explainable in terms of its bad overall consequences. If we wish to, we can say that some sorts of consequences should count as absolutely or irredeemably bad.

As well, why should we feel bound to judge the rightness of acts entirely apart from all of their consequences? It may make sense to argue, for example, that fulfilling a legal contract or keeping a promise is right whether or not that act has the consequence of actually reinforcing the system of promise-keeping.[32] Admittedly, we do not normally encourage persons to imagine various good and bad consequences before deciding whether to keep their promises. But don't we ultimately look to consequences to justify contracting or promise-keeping as an institution? Why would we bother with the institution of contracts or promise-keeping unless it generally led to good consequences? Why have contracts or promise-keeping, generally, if promise-keeping generally undercuts human interests and

29. *See, e.g.*, H.A. PRICHARD, DOES MORAL PHILOSOPHY REST ON A MISTAKE?, *in* MORAL OBLIGATION: ESSAYS AND LECTURES 1, 10 (1949) ("[A] morally good action is morally good not simply because it is a right action but because it is a right action done because it is right, i.e. from a sense of obligation."); ROSS, *supra* note 24, at 46-47 ("[A]n act is not right because it, being one thing, produces good results different from itself; it is right because it is itself the production of a certain state of affairs. Such production is right in itself, apart from any consequence.").

30. *See, e.g.*, RAWLS, *supra* note 28, at 26.

31. *See, e.g.*, ROSS, *supra* note 24, at 46-47.

32. *See id.*

human fulfillment? If we couldn't justify promise-keeping in terms of good net consequences, how could we morally justify it at all?[33]

Should we say, then, that Rawls and other writers simply have it backwards, and that actually, the good is prior to the right? A number of modern philosophers have endorsed such an approach. G.E. Moore, for example, famously argued that "to assert that a certain line of conduct is . . . right or obligatory, is obviously to assert that more good or less evil will exist in the world, if it be adopted than if anything else be done instead."[34] The contemporary philosopher L.W. Sumner writes that "[t]he idea that the unifying—and justifying—function of all of our ethical categories is ultimately to make our lives go better, or to make the world a better place, is one that I find utterly compelling."[35] This would prioritize the good.

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33. It is certainly possible to complicate matters by arguing that the right is only partially or in some contexts prior to the good, but this would not change our ultimate analysis. For some relevant discussion, see James Griffin, *The Human Good and the Ambitions of Consequentialism*, 9 SOC. PHIL. & POL'Y 118, 132 (1992).

34. GEORGE EDWARD MOORE, PRINCIPIA ETHICA 25 (1971); *see also* A.C. Fox, *The Right and the Good Once More*, 28 AUSTRALASIAN J. PHIL. 1, 1 (1950) (making "a plea for the necessary dependence of the right upon the good, and of the ought-to-do upon the ought-to-be"); A.E. Taylor, *The Right and the Good*, 49 MIND 219, 223 (1940) ("What is our standard when we compare the relative gravity of departures from right? I do not see where to find it unless in the *badness* of the acts compared."). Some philosophers who believe in the priority of the good to the right are called consequentialists, of which utilitarians would be a sub-group. For a discussion of consequentialism, see Judith Lichtenberg, *The Right, the All Right, and the Good*, 92 YALE L.J. 544, 545 (1983) (reviewing SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM (1982)) ("All [consequentialist] theories hold some kind of stuff to be intrinsically good and define rightness—right action—in terms of that good."). *See also* Germain Grisez, *Against Consequentialism*, 23 AM. J. JURIS. 21 (1978) (analyzing consequentialist theories). One can, however, believe in the priority of the good to the right without also being a consequentialist. *See, e.g.*, L.W. Sumner, *Two Theories of the Good*, 9 SOC. PHIL. & POL'Y 1, 2 & n.1 (1992). And one could accept some theory in which the good is somehow only partially prior to the right. *See, e.g.*, WILLIAM K. FRANKENA, ETHICS 79-80 (1963); C.D. Broad, *Some of the Main Problems of Ethics*, 21 PHIL. 99, 105 (1946) (stating "[o]ne characteristic which tends to make an act right is that it will produce at least as good consequences as any alternative open to the agent in the circumstances," but going on to contrast the reason for the rightness of promise-keeping).

35. Sumner, *supra* note 34, at 1. Sumner continues: "What else could morality be *for*? And if it is not *for* anything—if it has no point—what claim can it have on our allegiance?" *Id.* Among classical philosophers, one could cite, for example, Aquinas and Aristotle as centrally concerned with the category of the good. *See* 1 ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. I-II, question 94, art. 2, at 1009 (Fathers of the English Dominican Province trans., Benziger Bros. 1947) ("*[G]ood is that which all things seek after.* Hence this is the first precept of law, that *good is to be done and pursued, and evil is to be avoided.* All other precepts of the natural law are based upon this . . . ."); ARISTOTLE, ETHICA NICOMACHEA bk. I, ch. 2, 1094a1-1094a3, at 308, *in* INTRODUCTION TO ARISTOTLE (Richard McKeon ed., W.D. Ross trans., 1947) ("[E]very action and pursuit, is

This line of argument has great appeal. Surely morality cannot amount to an ultimately pointless exercise if it is also to have any rationally binding force. And the point of morality must, we might imagine, lie ultimately in promoting well-being, or someone's good. Surely better lives must be rationally preferable to worse lives.

But to focus on the good, or more specifically on maximizing the good, seems incomplete and unattractive. As soon as we start to clarify what we mean by promoting the good, we find that we must refer to ideas of the right, of fairness, of justice, and of distributional concerns generally. The idea of good, unless it expands to swallow up the right, does not seem to take proper account of ideas such as integrity, respect, commitment, dignity, the specialness of certain social relationships, infinite personal value, and the irreplaceability of persons.

Suppose we start out to maximize the good, and that we have some idea of what the good consists of. Even at a very early stage, considerations of the right, and of justice and fairness, inevitably creep in and must somehow be addressed. We must, for example, in maximizing the good, ask the basic question: Who counts? Does everyone count equally? Do all people near the very end of life count equally? Do people who will probably exist fifty years from now count equally? Do sentient animals count equally? Does a close relative count equally with a complete stranger? Do people classified as incompetent all count equally? Does a member of one's own group count equally with those outside the group? Does one to whom I have made a promise count equally with one to whom I have not? How should we count the dependent, the vulnerable, and the helpless? How should we count the good of those who have culpably violated basic moral and legal principles? How does the possibility that we could increase or decrease the number of future persons, or of future sentient beings, relate to maximizing the good?[36] What if people differ in their ability to create or appreciate the good? What if we rightly decide that there are many different forms of the good, and many different ways of living a good or flourishing life?[37] How are we then to add up or compare quantities of the good in such cases?

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thought to aim at some good; and for this reason the good has rightly been declared to be that at which all things aim.").

36. Some of these and other considerations have led one important contemporary philosopher to deemphasize, over time, the role and status of the good, as contrasted with the right, in political ethics. *See generally* BRIAN BARRY, A TREATISE ON SOCIAL JUSTICE (1995), *as discussed in* Richard J. Arneson, *The Priority of the Right over the Good Rides Again*, 108 ETHICS 169, 169-70 (1997).

37. *See, e.g.*, Neil MacCormick, *Natural Law and the Separation of Law and Morals*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 105, 127-28 (Robert P. George ed., 1992). Of course, there are also various forms of moral and nonmoral goodness. For typologies of these various forms of the good, see GEORGE HENRIK VON WRIGHT, THE VARIETIES OF GOODNESS 8-11 (1963) and Ju-

The problem is not that the priority of the good does not by itself tell us much. Deciding that the good should be prior to the right certainly does not suggest even the outlines of a complete ethical or legal theory. But this hardly impeaches the alleged priority of the good. Rather, the problem is that one cannot outline an ethical or legal theory of the good without crucially relying on the ideas of the right, of fairness, and of justice. As the questions above suggest, one cannot specify a process of legally or morally pursuing the good that does not depend on some view about fairness in distributing or counting the good.

Thus neither the right nor the good is prior to the other. They are instead inevitably built into each other, and inherently inseparable from each other.[38] No plausible moral or legal theory can simply adopt a basic view of the right and only then go on to address questions of the good, or vice versa. There can be no plausible theory of the right independent of the good, and no plausible theory of the good independent of the right. Doubtless this seems like a rather abstract, formal point. We shall now see, however, that it has crucial implications for contemporary legal systems, and for constitutional law in particular.

II. LOSING CONFIDENCE IN THE SPLIT BETWEEN RIGHT AND GOOD: CONSEQUENCES FOR THE LAW OF THE INTERDEPENDENCE OF THE RIGHT AND THE GOOD

A. Paternalism and Legal Justice

We have just introduced the inseparability of doing the right, just, or fair thing on the one hand, and pursuing a good or valued life on the other. The distinction seems no less hazy at either the individual or the societal level. That is, there is no clearer line between societal justice and the ways in which citizens in general are allowed to lead their lives in pursuit of their good than there is between the just treatment of a given individual person and whether

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dith Jarvis Thomson, *On Some Ways in Which a Thing Can Be Good*, 9 SOC. PHIL. & POL'Y 96 (1992).

38. *See, e.g.*, MacLean, *supra* note 11, at 129 ("[S]ome conception of the good is involved in characterizing actions as right or wrong."); Pybus, *supra* note 10, at 20-22 (arguing for interdependence and complementarity of these two aspects of morality); Henry S. Richardson, *Beyond Good and Right: Toward a Constructive Ethical Pragmatism*, 24 PHIL. & PUB. AFF. 108, 129 (1995) ("Rather than seeing the right as constraining the (pursuit of the) good, the constructive ethical pragmatist will hold that the right is to be built into the good (and vice versa)."). We will not need to argue for the more ambitious proposition that the good and the right are not only inseparable, but utterly identical, or even that they are merely two ways of looking at the same thing, or perhaps "two sides of the same coin," depending upon what this familiar if rather unclear expression is thought to mean.

that person is allowed to pursue her own view of how to best lead her own life.

The supposed line between the right and the good is thus dubious. A moment's thought suggests, however, that this is not an inconsequential matter. Most obviously, a rejection of broad, frequent, intrusive paternalism is a feature of our legal system.[39] Of course, our legal system holds many acts to be legally wrong or unjust, as in the case of, say, rape, theft, or failure to pay taxes. Crucially, though, with some exceptions, the legal system generally seeks to avoid coercively imposing particular conceptions of the good life on competent adults who consistently reject those conceptions over time.[40] Thus the government does not prohibit watching pro wrestling, consuming hot dogs, and buying celebrity gossip magazines, or require fitness walking, adult education, and spinach consumption.

But if the right and the good are inseparable, in the sense of mutually informing and mutually constituting each other, can any legal system really avoid arbitrariness and inconsistency in this respect? If the right is at least in part composed of the good, and vice versa, how can this general antipaternalism be coherent and defensible? How can any legal system coercively impose the right and the just, while being generally neutral toward and tolerant of diverse understandings of the good life, of what is valuable, and of human flourishing? How can a legal system impose particular views of what is right and just, but not of what is good and valuable?

The contemporary legal theorist John Finnis, for example, has sought to undermine standard theories of antipaternalism in this way.[41] If the right and the good are so difficult to separate, how can the law impose controversial views of the former, but not of the latter? If justice cannot be disentangled from the good life or human flourishing, why should the law mandate a certain view of the former, but liberally tolerate diverse views of the latter? How can it take this approach without arbitrariness, if not a pathologically split personality?

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39. *See, e.g.*, Michael D. Bayles, *Criminal Paternalism*, *in* THE LIMITS OF THE LAW 174 (J. Roland Pennock & John W. Chapman eds., 1974); Rosemary Carter, *Justifying Paternalism*, 7 CANADIAN J. PHIL. 133 (1977); Bernard Gert & Charles M. Culver, *The Justification of Paternalism*, 89 ETHICS 199 (1979).

40. *See, e.g.*, Ronald Dworkin, *Liberalism*, *in* PRIVATE AND PUBLIC MORALITY 125, 127 (Stuart Hampshire ed., 1978) ("[P]olitical decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life."); Charles Larmore, *Political Liberalism*, 18 POL. THEORY 339, 341 (1990) (arguing liberalism "aims to be neutral with respect to controversial views of the good life"); Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127, 128 (1987) ("[L]iberals are committed to a conception of freedom and of respect for the capacities and agency of individual men and women. . . .").

41. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 222 (1980).

In particular, Finnis suggests that the legal system arbitrarily categorizes those rules it disfavors as rules about the good or human flourishing, rather than about justice or the right.[42] Thus any attempt to legally impose such a rule is labeled as "paternalism," and is disfavored. On the other hand, rules favored by the legal system are said either to fit within some exception to the general bar against paternalism, or to be matters of right and justice, and not merely about some controversial view of what is good. But—and this is the crucial point for Finnis—any particular understanding of the good life or human flourishing for a person or for a society can be "translated" into a claim about what is legally just and right.[43] Thus the claims of even the most intrusive busybody can be reformulated into claims about justice and the "trump card" of rights.

This argument seems to threaten basic legal values. Must the legal system just admit to its hypocrisy and arbitrariness in this respect, and thereby perhaps legitimize endless legal intrusions into what is central to our personal identities? If the law prohibits, say, rape or racial discrimination, does it thereby legitimize legally compulsory attendance at piano recitals or pie-eating contests? Or if the law prohibits racial discrimination, is the door thereby opened to laws requiring racial segregation on what would initially be thought of as paternalistic grounds, but now merely translated into claims about justice for some selected person or group? Can every personal preference about the good be refitted as a claim about enforceable right and justice? If so, we would not settle much by declaring that the government should not impose controversial ideas of the good. Every claim about the good could be turned into a claim about justice and the right.

One possible way of responding to Finnis, and addressing this concern, would be to claim that there is a crucial difference between deciding for others and deciding for oneself. On this approach, there is a crucial moral difference between, say, deciding that one will abstain from alcohol, and imposing a legal prohibition of alcohol on all competent adults, regardless of their refusal to agree. The latter, paternalistic step, taken over the protests of many of those most directly affected, is said to violate an underlying principle of the equal moral agency of persons.[44] A legal rule that allows person *A* to decide whether person *A* shall drink, and that allows person *B* (only) to decide whether person *B* shall drink is said to respect the moral equality of both *A* and *B*. On the other hand, a legal rule that imposes *A*'s preference on *B*, and not *B*'s on *A*, and disallows *B*'s

42. *Id.*

43. *Id.* ("[T]there is no difficulty in translating any 'paternalist' political preference into the language of entitlement. . . .").

44. *See* Wojciech Sadurski, *The Right, the Good and the Jurisprude*, 7 L. & PHIL. 35, 46-47 (1988).

preferences even for *B*'s own behavior, is said to violate the moral equality of *A* and *B*.[45]

This is, however, a tricky business. Suppose first that *A* wants to racially discriminate against *C*, who does not care about *A*'s policy, and that *A* genuinely and freely does not care whether *B* discriminates against anyone. *B* is horrified, but not directly or personally affected, by *A*'s discrimination against *C*. Person *A* thus wants (personally) to discriminate, but does not want to impose a uniform nondiscrimination rule on everyone, regardless of their beliefs. The person who seeks legally to control other persons' drinking may violate the equal moral agency of persons. What of the person who seeks legally to control other persons' hiring practices, even if the person to be protected against discrimination is indifferent to the rule?

In such cases, though, *B* can at least argue that *A*'s discrimination affects a third person, *C*, directly. Realistically, *C* is unlikely to be indifferent to personal discrimination. So *B* has something to say in defense of a nondiscrimination rule even if *A* claims that equal moral agency could be fulfilled by flipping a coin to choose between *A*'s policy and *B*'s or that *A*'s discriminatory preferences should be respected half the time, and *B*'s universal nondiscrimination policy the other half the time. To discriminate is to decide certain things not only for oneself, but also for others.

Every important personal preference, however, is likely to have some effects, consensual and nonconsensual, on third parties. Actually, no preference, personal or more explicitly social, is without its external effects. Our legal system, though, often follows John Stuart Mill in trying to distinguish acts that primarily affect the interests of other, unconsenting persons, and acts that primarily affect oneself.[46] But this boundary is frequently hazy and indeterminate. Busybodies can eventually learn to reformulate their concerns, and to couch them in the language of justice and social rights.

After all, the essence of a claim of unjust discrimination may be that *A* and *D* have entered into a voluntary contract without adequately and fairly considering someone else's abilities, talents, or interests. Suppose, instead, that *A* and *D* propose to buy and sell some controversial item between themselves, and that FMB—a formerly mere busybody—knows about their transaction. Why must FMB argue only that FMB's bare knowledge should be enough to scotch the transaction between *A* and *D*? Why should FMB stop at arguing that the psychological distress from bare knowledge of this transaction outweighs the benefits flowing from the transaction? Why can't FMB argue that *A* and *D*'s transactions contribute

45. *See id.*

46. *See* JOHN STUART MILL, ON LIBERTY ch. IV (David Spitz ed., 1975) (1859).

to changing gradually the nature and character of the overall society for everyone, perhaps in ways *A* and *D* themselves do not appreciate or endorse? Why can't FMB argue that *A* and *D* thus change the society that FMB must live in for the worse, without FMB's consent? Why can't FMB argue that *A* and *D* are actually impairing FMB's potential development in important ways? Why aren't *A* and *D* violating some alleged right held by FMB? And if *A* and *D* are violating FMB's rights or treating FMB unjustly, FMB is not being a mere busybody in objecting.

Doubtless *A* and *D* could make parallel arguments about FMB's favored policies, but that is just the point. It is difficult to rule out most policies formerly thought of as merely paternalistic, but now defended on grounds of alleged right, fairness, and justice, simply by a broad appeal to the equal moral agency of persons. The equal moral agency of persons, by itself, will not rule gross paternalistic impositions in the name of justice. The right and the good are too intertwined and too inseparable for such a simple, general argument to succeed.

What, then, can be said to former mere busybodies who now talk the language of rights, justice, fairness, and equality? As we have seen, no quick, general disqualification is possible.[47] But this does not leave us defenseless against FMBs. Suppose someone argues that her individual potential will be crushed, in an unjust and rights-violative kind of way, unless we all spend time juggling or, alternatively, unless we all forswear juggling even in the privacy of our own homes. Why not look at the merits of her claim, from everyone's perspective, impartially? Merely to assert a right, after all, is not yet to establish or justify an actual enforcement-worthy right. We cannot, of course, herein offer a substantive theory of justice. But ideas such as intrusion, privacy, dignity, personal identity formation, autonomy, personal freedom, exploration and experimentation, and fulfillment through individual choice are not so empty as always to point equally strongly in both directions whenever anyone seeks to dress up a paternalist claim in the language of justice and rights. Claims of justice and the right can always be made, but this does not mean they can always be made convincingly. Not all claims about justice and the right become equally plausible merely

47. For an interesting formulation of the same underlying problem, see Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 87 (1995).

> One cherished commitment that might be vulnerable is The Harm Principle itself. Although there may be practical reasons that will often weigh against the state seeking to promote virtue, what reason of principle would require society to limit its coercive powers to preventing rights violations when those rights themselves get their nature and importance from some human good they seek to respect? I see no clear reason.

Id.

because we realize that unconsenting third parties may be adversely affected by any legal rule at all, of any sort.

In the juggling case, for example, we can begin by asking about numbers of persons affected, concrete interests involved, centrality to personality, and, if we wish, the depth and permanence of feeling of all parties affected. We can reflect on the rational cogency of the claims made and their logical linkages. Not every claim will be equally convincing. We can work through the complex application of the ideas referred to above. Finally, and perhaps more interestingly, we could think about precedential and incentive effects, the potential for manipulation involved, and whether any preoccupation with juggling or its prohibition was freely or else arbitrarily arrived at. Crucially, we would ask whether the preoccupation with juggling could be interestingly defended in rational terms. Or does the claimant immediately retreat into unshareable personal experience or private mystery? Even unshareable private experience can sometimes be linked to something we know about the public world. Is there no possibility of developing or rebutting the argument, to even a minimal extent, based on accessible evidence and public argumentative standards? Is any portion of the argument subject to any sort of confirmation or disconfirmation? We certainly need not insist on certainty, as opposed to probabilities, if we wish.

Ultimately, we should feel pessimistic about the fairness and power of such arguments only if we believe something like the subjectivity or relativity of all standards or in the inevitable rational interminability of all such debates. If instead we think that, in formulating and applying legal rules, some answers may be better than some other answers, we have no reason to feel defenseless before former mere busybodies who adopt the language of justice and right.

B. Can the Good Be More Subjective Than the Right?

We have suggested that the right and the good are inseparable at the most fundamental level. This apparently abstract point actually has crucial implications for an increasingly popular approach to law and the enforcement of moral views. Let us introduce the problem in the words of the contemporary philosopher George Sher:

> For some important reason—I am honestly not sure what—many liberals have concluded that reason's scope is drastically limited. Though still confident about our ability to reach universally applicable conclusions about justice and rightness, these thinkers are much less sanguine about the prospects for reaching reasoned conclusions about goodness or value. There is, in their view, some sort of important asymmetry between what reason can hope to show us about what persons are mor-

> ally obligated to do and what it can hope to show us about how it is best to live.[48]

Now, if the right and the good are as inseparable as we have suggested, it seems curious to believe the right to be more reason-governed than the good. We need not speculate as to all of the possible reasons for having more confidence in conclusions about the right than about the good. Let us focus instead on one important line of contemporary thinking.

A number of contemporary schools of thought inside and outside of the law have concluded that all of the claims we make about both the right and the good are less substantial, less solid, and less real than has commonly been supposed. This general spirit is captured by the report that "[k]nowledge and truth are fantasies. Objectivity is unattainable. Foundationalism is dead. We are limited to our historically situated, subjective perspectives. So we are told by postmodern scholars both inside and outside legal academe."[49]

Any number of different approaches, inside and outside of law schools, have abandoned the traditional general idea of objective truth, in moral and jurisprudential issues and elsewhere. Camps such as pragmatism,[50] relativism,[51] subjectivism,[52] error theory,[53]

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48. GEORGE SHER, BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS at ix (1997).

49. Ken Kress, *Modern Jurisprudence, Postmodern Jurisprudence, and Truth*, 95 MICH. L. REV. 1871, 1871 (1997) (reviewing DENNIS PATTERSON, LAW AND TRUTH (1996)). Ronald Dworkin offers a more elaborate characterization of generally anti-objectivist schools of thought:

> Is there any objective truth? Or must we finally accept that at bottom, . . . there is no "real" or "objective" or "absolute" or "foundational" or "fact of the matter" or "right answer" truth about anything, that even our most confident convictions about . . . who is wicked are just our convictions, just conventions, just ideology, just badges of power, just the rules of the language games we choose to play, just the product of our irrepressible disposition to deceive ourselves that we have discovered out there in some external, objective, timeless, mind-independent world what we have actually invented ourselves, out of instinct, imagination, and culture? The latter view . . . now dominates fashionable intellectual style.

Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 87 (1996); *see also* William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995). Professor Marshall introduces his argument in the following terms: "Contemporary philosophical thought, it is said, does not believe in truth, at least in the 'objective' or 'transcendent' sense of the word. To the contemporary mind, objective or transcendent truth is seen as nonsensical or, at best, unintelligible." *Id.* at 2 (citing C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1). For purposes of his article, Professor Marshall is agnostic on the existence of any objective truth. *See id.* at 4.

50. *See, e.g.*, HILARY PUTNAM, THE MANY FACES OF REALISM 77-78 (1987) ("[O]ur moral beliefs, in my view, are not approximations to The Universe's Own Moral Truths . . . ."); RICHARD RORTY, CONTINGENCY, IRONY, AND SOLI-

quasi-realism,[54] noncognitivism,[55] and skepticism or nihilism[56] agree in watering down, if not flatly rejecting, familiar understandings—whether commonsensical or naive—of the language of right, good, and justice.[57]

For the sake of convenience, let us refer to all of the above schools by the single term "subjectivism," to highlight the contrast with those who pursue a more objective truth. This broadly defined subjectivism is enormously popular and influential, and we shall address it in Part IV below. For the moment, though, we shall focus on a popular compromise, or split of the legal personality, between subjectivism and objectivism. We are seeking to explain the current tendency, noted by Professor Sher,[58] to accept the rational objectivity of justice and the right, while at the same time assuming the subjectivity of the good.[59]

One useful explanation of this split of the personality starts against the background of some sort of general moral subjectivism. Let us assume that someone starts out as some sort of subjectivist. Despite the popularity of broad moral subjectivism, it is certainly

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DARITY 173 (1989) ("I do not think there are . . . any neutral ground[s] on which to stand and argue that either torture or kindness are preferable. . . .").

51. *See, e.g.*, DAVID B. WONG, MORAL RELATIVITY (1984); Gilbert Harman, *Moral Relativism Defended*, *in* RELATIVISM: COGNITIVE AND MORAL 189 (Michael Krausz & Jack W. Meiland eds., 1982); *cf.* Brenda Almond, *Seven Moral Myths*, 65 PHIL. 129, 131 (1990) ("It is no exaggeration to say that relativism is the prevailing ideology of our schools and colleges at the present time."). For a useful typology of possible relativist claims, see ROM HARRÉ & MICHAEL KRAUSZ, VARIETIES OF RELATIVISM (1996).

52. *See, e.g.*, Judith Lichtenberg, *Subjectivism as Moral Weakness Projected*, 33 PHIL. Q. 378 (1983); Steve F. Sapontzis, *Groundwork for a Subjective Theory of Ethics*, 27 AM. PHIL. Q. 27 (1990).

53. *See* JOHN L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG (1977).

54. *See* Simon Blackburn, *Errors and the Phenomenology of Value*, *in* MORALITY AND OBJECTIVITY 1 (Ted Honderich ed., 1985); Bernard Williams, *Truth in Ethics*, 8 RATIO (n.s.) 227 (1995); Crispin Wright, *Truth in Ethics*, 8 RATIO (n.s.) 209 (1995).

55. *See, e.g.*, ALLAN GIBBARD, WISE CHOICES, APT FEELINGS (1990); CHARLES L. STEVENSON, ETHICS AND LANGUAGE (1944); Nicholas Unwin, *Can Emotivism Sustain a Social Ethics?*, 3 RATIO (n.s.) 64 (1990).

56. *See, e.g.*, MACKIE, *supra* note 53; Richard T. Garner, *On the Genuine Queerness of Moral Properties and Facts*, 68 AUSTRALASIAN J. PHIL. 137 (1990) (discussing MACKIE, *supra* note 53); Jeffrey Goldsworthy, *Externalism, Internalism and Moral Scepticism*, 70 AUSTRALASIAN J. PHIL. 40 (1992) (same).

57. Members of these schools may, depending upon how their work is interpreted, either belong to a school other than to which the above footnotes assign them, or to more than one school. Examples of members of the above schools could be multiplied almost indefinitely.

58. SHER, *supra* note 48, at ix.

59. One might want legally to impose rules of justice, but not of the good, for reasons other than that one thinks justice to be more objective than the good. *See, e.g.*, BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10-12 (1980) (discussing the value of experimentation, of autonomy, and of avoiding concentrated authority even if the good is in some sense objective).

possible to raise disturbing questions about such views. Consider, for example, the candid response of the subjectivist to requests for support by, let us say, a campus anti-racism or anti-rape group. No doubt the subjectivist will want to support these groups, perhaps with much personal effort, intense emotion, and for all sorts of appealing public reasons. What the subjectivist cannot say, however, is that these groups are genuinely right in what they say and do, unless "genuinely right" is defined in some watered down sense.

Given the wide range and variety of subjectivist views, we cannot conveniently represent how the subjectivists would continue their response. The relativist, for example, must say that the moral status of rape does not and cannot transcend the standards of particular groups. If the relevant groups happen to be, say, statistically average young men and women, then the young men will have some (sophisticated or simple) set of norms regarding rape, and the young women will have theirs. Those standards set by the men and the women may or may not correspond, or even partially overlap. To the extent that they do not, there are no group-transcendent norms to which they can appeal. Both groups can probe for inconsistencies, but if the ultimate standards of the men and women diverge, there is no possibility of any common appeal or any objectively better or worse answers to seek out.

Realistically, it is unlikely that anti-racism or anti-rape groups will long be satisfied with this state of affairs. This is likely to be so even though relativism is group-based. Subjectivism or relativism distorts the life experience of those who unjustly suffer. They are, in effect, being told that their commitments, however fervently held, are less fully rational and more ultimately arbitrary than they imagine. Beliefs about racism or rape can be emotionally strong and linked to public reasons, but they cannot really be deeply held in the traditional sense. They cannot be true in the sense in which traditional opponents of racism or rape have historically believed them to be true. They are, perhaps, rather like fervently held football team loyalties. Of course, victims of racism or of rape are reluctant to accept this dilution. Some groups or persons, after all, profit from injustice. Over the long term, it will take objective reasons to surrender this unjust profit.

Let us suppose that the subjectivist and the anti-racism or anti-rape group members have explored each other's views. Surely one very natural result would be a sort of compromise, or dualism, of just the sort referred to by Professor Sher.[60] This general compromise has now become a mainstream approach among legal theorists.[61] On this compromise, certain principles of justice or the right

60. SHER, *supra* note 48.

61. *See* KENNEDY, *supra* note 3, at 305 (stating that in mainstream American legal analysis, values—as distinguished from facts—are assumed to be subjective and ultimately arbitrary, but reasoning that rights, and hence what

would be given a privileged status. The wrongness or injustice of rape and racism would, in our example, be deemed to be objective and rationally secure. This would validate the concerns of the anti-racism and anti-rape groups as able to withstand the deepest sorts of challenge.

But on this compromise, the objectivity of certain principles of justice and the right is not matched by any equally objective principles of the good. There is a split of the legal personality. The good life, what one chooses to value, and what ought to be, is considered more subjective than the right. This subjectivist part of the compromise would, superficially, appear to fit nicely with basic themes of pluralism, tolerance, diversity, and libertarianism. If the goodness of good lives is subjective, why not let each person pursue her own?

The subjectivity of the good life would accommodate, to some degree, the sense that morality as a whole is not a matter of seeking any objective truth. And on this compromise, those who come to accept certain principles of justice as objective would avoid an apparent failure to appreciate the real moral nature and status of rape or racism. If the good is, on the other hand, deemed more subjective than the right, this compromise seems to promise the best of both worlds. The trick, of course, will be to prevent an apparent compromise from unraveling into a mere split personality.

The idea of treating the good as more subjective than the right is not only currently fashionable, but has some historical precedent. The great political theorist Thomas Hobbes, for example, is sometimes interpreted as holding this view. It has thus been argued that:

> The basic idea behind Hobbes' political philosophy is that, in nature, there is no basis for opinions of good and bad, and so people are certain to disagree about what is good and bad, but they can all agree on the need for peace and security. The latter need gives sense to the notions of the right, and to the sense of justice.[62]

Whether this distinction is viable is actually extremely dubious.[63] Our initial concern, however, is merely to establish an early pedi-

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is right for government to do, are assumed to transcend mere arbitrary value judgments); *see also* SHER, *supra* note 48, at ix (discussing the view of liberals that there is asymmetry between what reason says is moral and what it says about how best to live).

62. Sadurski, *supra* note 44, at 42.

63. If we try to assess the merits of Hobbes's distinction between the right and the good, we might first ask, for example, whether people do in fact often see involuntary starvation or child torture as attractive and legitimate avenues of the good life, assuming these dimensions of the alleged good are separable from issues of justice and the right. And we would also have to ask whether the zealot, the Samurai, the martyr, the fanatic, the Klingon, the saint, or the warlike is willing to rank peace and personal bodily safety as high as Hobbes re-

gree for the modern view that the good is more subjective than the right.

Hobbes does seem to fit in here. Consider Hobbes's classic discussion of the good:

> [W]hatsoever is the object of any mans [sic] Appetite or Desire; that is it, which he for his part calleth good . . . . For these words of Good . . . are ever used with relation to the person that useth them: There being nothing simply and absolutely so; nor any common Rule of Good and Evill [sic], to be taken from the nature of the objects themselves . . . .[64]

Contrast this subjectivist account of the good with Hobbes's discussion of the first principles of justice and right action: "*A law of nature* . . . is a Precept, or generall [sic] Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life . . . ."[65] Justice and right action are thus discussed in more objective terms. There is certainly no hint that the good, on the other hand, is found out by some allegedly shared human reason.[66]

There is, therefore, distinguished precedent for those who today consider the good more subjective than the right. Precedent, however, does not make the idea coherent or viable. Treating the good as more subjective than the right may still be just another manifestation of a split legal personality. We already have some reason to believe that the right and the good are nearly indistinguishable. If so, it would make little sense to argue that the right is more objective and the good more subjective. We have even more reason to believe that the right and the good are inseparable and that they help define and constitute one another.[67]

Now, if the right and the good were merely inseparable, this by itself would not show that they must be equally objective or subjective. By a very loose analogy, someone might consider mind and body to be inseparable, yet quite different in their basic natures. But if, as we have argued, the right and the good crucially help define and constitute each other, it is much harder to see how one could be more subjective than the other. The subjectivity or objec-

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quires. Hobbes's distinction between the right and the good seems no more appealing and viable than anyone else's.

64. THOMAS HOBBES, LEVIATHAN 39 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

65. *Id.* at 91.

66. Charles Larmore points out, instead, that "for Hobbes, an object's being good for a person consists in its being desired by him, that it is nothing but the projection of his desire." Larmore, *supra* note 20, at 20; *cf.* RALPH BARTON PERRY, GENERAL THEORY OF VALUE: ITS MEANING AND BASIC PRINCIPLES CONSTRUED IN TERMS OF INTEREST 604 n.13 (1926) ("Value is conditioned by the occurrence of an interest-judgment, but not by the truth of that judgment. It is a function of belief rather than of knowledge.").

67. For a discussion of the interrelatedness of the right and the good, see *supra* Part I.

tivity of the one would be inescapably imported and defined into the other. Each would bear the quality of the other.

We thus have some grounds for doubting that the good can be more subjective than the right. Let us pause to consider objections, though. Isn't it clear, for example, that at least in some contexts the good is undeniably subjective? Suppose someone says that chocolate tastes good, or that chocolate tastes better than vanilla. Isn't that obviously just a subjective claim as to personal taste? Is any claim implied about some objective hierarchy of tastes written into nature and detectable by every rational agent or by every cultivated palate?

No doubt flavor preference is indeed the model for mere subjectivity. This, however, is hardly under debate. The subjectivity of taste and appetite and even of sports team loyalties need not be disputed by anyone who doubts that the good is generally more subjective than the right. The idea of the good occurs in numerous contexts,[68] not all of which are relevant to a comparison with the status of justice or the right. We are most interested in the good in the sense of living a good or fulfilling life, having a good character, being morally good, and such. Philosophers today do not battle over whether there is really a best tasting flavor of ice cream on which we sadly have yet not concurred. Instead, the dispute is over such matters as the status of claims about good or fulfilling lives.

We could, after all, adopt a subjective sense of right to parallel the subjectivity of goodness of taste. This subjective sense of the right would be quite inconsequential. We might say, for example, that chocolate is the right flavor to choose if one is looking for good ice cream. This sense of right would be no more objective than claims of goodness of taste. We are, however, more interested in things like the goodness of lives. And here, it is possible to argue that such claims can be no less objective than claims about justice and rightness.

One need not, for example, adhere to some obsolete brand of Aristotelianism to believe that some lives are objectively better than some other lives. This need not involve elitism or paternalism—quite the opposite. Which, for example, is more objectively true (or false, for that matter): that a life of involuntary slavery, ending involuntarily at age nineteen in wracking disease, frightened and alone, and having accomplished nothing, is ordinarily not a good life? Or a claim that the morally right or just thing to do in some given case is to donate to one well-run charity but not the other?[69]

68. For a discussion of these contexts, see *supra* note 37.

69. Despite obvious deep disagreements about many matters of justice and the right, it is still claimed that there is a stronger consensus on justice and the right than about the good life. *See, e.g.*, Sadurski, *supra* note 44, at 51 & n.28. *But cf.* Arneson, *supra* note 36, at 187 ("Why on earth suppose that beliefs about the right will be any less controversial than beliefs about the good?"). *See*

The former is a question of the good, and the latter a question of the right. Yet the former seems reasonably answerable in a way the latter is not. The right thing to do in the latter case is usually indeterminate in the sense of being objectively unanswerable. Let us continue to think about justice and the right, but this time more broadly. Do we really agree more about justice and the right, as on matters of welfare reform, immigration, abortion, economic redistribution, and affirmative action? These are important issues of justice. Someone might reply that issues of justice are by definition controversial. But can we really say that there are fewer important unresolved issues of justice and the right than of the good life?

No doubt there are many and diverse ways of achieving a good life.[70] The diversity of the good, however, does not tell us anything about whether the good is subjective or objective. To see this, consider a mathematical analogy. One might select from an infinite set of numbers if one were, say, searching for examples of odd numbers. One would thus have an enormous range of choice of odd numbers. This would not, however, make the concept of an odd number into a subjective one. Pluralism and diversity thus do not imply subjectivity. There are many odd numbers to choose, but the oddness of any given number is not a matter of the chooser's discretion. There are also many and varied ways of effectively pursuing a good life. It could be, and indeed is, objectively right or just for a society to promote those many and diverse expressions of the objective good, given our differences in personal histories, cultures, abilities, interests, circumstances, and inclinations.

But the diversity of the good not only does not suggest that the good is more subjective than the right, it does not even show, by itself, that we really disagree much about the good. Suppose *A*, *B*, and *C* decide to become, respectively, a sailor, a musician, and a surfer. Are any of them necessarily disagreeing with any of the others, even if they all think that decisions about the good life are objective? Perhaps each simply feels that his or her talents and circumstances are unique. Each might feel that the other two have made the objectively best choice in light of their own variant talents and circumstances.

A moment's reflection reminds us, though, that there is more to the human good than nearly infinite diversity. A life of brainwashing, pointless and resented torture, and deep and unchosen illusion will tend to not be as good a life as other ways of being. Martha Nussbaum in particular has recently emphasized that not all

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also Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1734 (1995) (raising, without endorsing, the idea that "[p]erhaps participants in a liberal democracy can agree on the right even if they disagree on the good" (citing RAWLS, *supra* note 15, at 133-72)).

70. *See, e.g.*, R. GEORGE WRIGHT, REASON AND OBLIGATION: A CONTEMPORARY APPROACH TO LAW AND POLITICAL MORALITY 99-106 (1994).

imaginable ways of living involve equal flourishing.[71] In this, Professor Nussbaum draws crucially on Aristotle, who focused centrally on the human good and who is commonly interpreted as believing the human good to be largely objective.[72]

Thus, the idea that the good is more subjective than the right or the just again does not seem plausible. The very idea of genuine charity cuts against a subjective view of human flourishing. Otherwise, why not just cheaply re-educate the former recipients of charity to enjoy truly their currently undesired circumstances? One might object, however, that most of the arguments against the greater subjectivity of the good have thus far been at a rather general level. Do we reach the same conclusion if we narrow the focus to more specific contrasts between the right and the good? We can hardly contrast the right and the good in every specific context. But, we can survey enough important contrasts to show that it is implausible that the good is more subjective than the right.

What should be said, for example, about Justice Brennan's well-known endorsement of pluralism in the California paternity rights case of *Michael H. v. Gerald D*?[73] Justice Brennan argued that "[e]ven if we can agree . . . that 'family' and 'parenthood' are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do."[74] Justice Brennan seems clearly right in what he is actually saying here. All he is clearly committing himself to is that we disagree about the good, not that the good is subjective, or that the subjectivity of the good is why we disagree. But since Justice Brennan does use the

71. *See, e.g.*, Martha C. Nussbaum, *Aristotle on Human Nature and the Foundations of Ethics*, *in* WORLD, MIND, AND ETHICS 86 (J.E.J. Altham & Ross Harrison eds., 1995); Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202 (1992); *see also* Martha Nussbaum, *Aristotelian Social Democracy*, *in* LIBERALISM AND THE GOOD 203 (R. Bruce Douglass et al. eds., 1990); Martha Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, *in* THE QUALITY OF LIFE 242 (Martha Nussbaum & Amartya Sen eds., 1993).

72. For an extensive discussion of Aristotelian ethics, see the various essays in ARISTOTLE AND MORAL REALISM (Robert Heinaman ed., 1995). *See also* GEORGIOS ANAGNOSTOPOULOS, ARISTOTLE ON THE GOALS AND EXACTNESS OF ETHICS 65 (1994); TROELS ENGBERG-PEDERSEN, ARISTOTLE'S THEORY OF MORAL INSIGHT 261 (1983); FRED D. MILLER, JR., NATURE, JUSTICE, AND RIGHTS IN ARISTOTLE'S POLITICS 74 (1995); J. DONALD MONAN, MORAL KNOWLEDGE AND ITS METHODOLOGY IN ARISTOTLE 60 (1968); Robert Bolton, *Aristotle on the Objectivity of Ethics*, *in* ESSAYS IN ANCIENT GREEK PHILOSOPHY IV: ARISTOTLE'S ETHICS 7 (John P. Anton & Anthony Preus eds., 1991) ("Aristotle is traditionally regarded as a prime example of a philosopher who holds that ethical propositions are objectively true or false."). *But cf.* Bernard Yack, *Natural Right and Aristotle's Understanding of Justice*, 18 POL. THEORY 216 (1990) (rejecting the idea that Aristotelian natural right involves a search for, or appeal to, natural or "higher" standards of justice).

73. 491 U.S. 110, 136 (1989) (Brennan, J., dissenting).

74. *Id.* at 141 (Brennan, J., dissenting).

word "idiosyncrasies" in referring to our own individual practices,[75] it hardly seems absurd to treat Justice Brennan as a subjectivist regarding the good.

Justice Brennan is, in any event, here assuming at least a lack of consensus on certain elements of the good life. Again, differences in personal lifestyle choices do not necessarily imply real disagreements among persons over lifestyle. But where we genuinely disagree over matters of the good life, as we clearly do, we even more clearly disagree over corresponding matters of justice and the right. Could Justice Brennan plausibly argue that the good is subjective, and that we disagree over it, but that the right and the just are more objective, and that we have a clear consensus on such matters? Hardly.

We have no objective guide to justice and the right that we lack regarding the choice of a good life. Justice Brennan's argument, after all, is plainly not that we disagree over the good in the context of paternal rights, and that political majorities and the law fairly reflect this. Instead, the point of seeking to establish justice and the right by means of a federal constitutional right in this context is precisely to override an elected legislature, perhaps reflecting majority sentiment, that does not recognize such a right.[76] There is disagreement as to the nature of the good life, but there is also disagreement over what justice and the right require in this context as well.[77] This disagreement about justice and the right obviously carries over to the federal constitutional level. Justice Brennan's argument gives us no reason to believe that the good life is more subjective than matters of right and justice.

What, though, about other specific distinctions between the right and the good? Sometimes, for example, we try to distinguish what it is right to do from the good in the form of what ought to be.[78] Can this contrast help us to see the good, or what ought to be, as more subjective than the right, or what one ought to do? Again, no. As one modern writer has put it, "[t]hat something is a good is, itself, some reason to seek it or to do something that will bring it about."[79] This is merely another way of intimately linking the right and the good. As it happens, St. Thomas Aquinas is often accused of triviality in holding that the good is to be done and pursued, and that evil is to be avoided.[80] This may, in a sense, be empty advice.

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75. *Id.* (Brennan, J., dissenting).

76. *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 44 (3d ed. 1996) (discussing the counter majoritarian function of constitutional rights).

77. Justice Brennan himself, for example, was able to attract only two other Justices to his view of the scope of the right involved. *Michael H.*, 491 U.S. at 136 (Brennan, J., dissenting). This shows no more, but also no less, than the controversiality of the right.

78. *See, e.g.*, Pybus, *supra* note 10, at 26.

79. Stocker, *supra* note 24, at 91.

80. *See* Pybus, *supra* note 10, at 26.

But the inherent inseparability of the right and the good that Aquinas also points to here is hardly trivial, especially in suggesting that the right and the good do not operate at different levels of objectivity. It is instead a point of great significance for the law.

How about when we judge a person's character? Here again, the right and the good operate at similar levels. Suppose someone asks why we consider a particular person to be of good character. Why couldn't we reply in part that she is a just person, or is someone with a just character[81]—where justice again falls on the side of the right?[82] Would anyone suppose that when we make character judgments of good and bad, we are thinking in subjective terms, but that when we explain our character assessment, and refer to justice as a character trait, we are thinking in more objective terms?

Or let us test the difference between doing the right thing, and the motive from which we act, where the motive is assumed to be good or bad.[83] Let us take the clearest case we can find of an objectively wrong thing to do: a forcible rape. If anything is still thought to be objectively wrong, this will be it. But even here, must we say that the motivation or intent underlying the act is less objectively bad? Suppose, as seems likely enough, that the conscious motive of the rape was to subordinate or humiliate the victim. Do we want to say that the badness of this motive is just a matter of taste, or is merely relative to group preference?[84] Even if we assumed that such a motive did not have to be conscious, or otherwise as vile, would that make the moral character of the motive underlying the rape more subjective?

Couldn't it be argued that in an era of legal and political pluralism, there will often be more of a consensus that someone is of a good or of a treacherous or cowardly character than that the policy or decision she favors is the right or just one?[85] Is there not a greater consensus as to the quality of character of Richard Nixon and of Gandhi than on who was more nearly right on political, military, or diplomatic doctrine? Sometimes, when we seem to impugn the character of political antagonists, we are really not criticizing their character so much as their failure to see how their actions or political beliefs lead to wrong decisions, or to bad outcomes, despite their good intentions. This failure on their part may, but need not, itself reflect badness of character.

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81. *See* SIDGWICK, *supra* note 21, at 4.

82. For a discussion of the link between justice and the right, see *supra* note 10 and accompanying text.

83. *See* ROSS, *supra* note 24, at 6-7, 156.

84. For a discussion of the risks associated with group subjectivism, see *infra* Part IV.

85. For a related general discussion, see John A. Oesterle, *Morally Good and Morally Right*, 54 MONIST 31, 31 (1970).

III. THIN MEANINGS AND THICK ASSOCIATIONS: RONALD DWORKIN ON THE LEGAL REGULATION OF EUTHANASIA

Professor Ronald Dworkin is a preeminent legal philosopher of our time.[86] Yet it is not much of an exaggeration to say that one of the most interesting and obvious things about his recent work is the deflated way in which he uses standard terminology. Consider, for a moment, how the idea of the sacred, of the inviolable, of sanctity, or of the objective are typically used. Some of us, of course, have no use for some or all of these ideas. We may consider them dangerous, misguided, or obsolete. Professor Dworkin, however, relies explicitly on them all—but in rather evacuated senses. This may be partly a matter of his simply not believing in or valuing any stronger sense of the terms. But this may also reflect an unconscious ambivalence and an unconscious unwillingness to break completely with ideas that no longer inspire full confidence. Professor Dworkin's use of these terms is certainly clear, honest, fair, and consistent. Yet typically, there is an inevitable echoing of and implicit reliance on prior, broader meanings and associations. The ghosts of the traditional meanings of the terms must do some of the argumentative work for Dworkin.

The point is not that Professor Dworkin is unique in this curious "objective" ambivalence. He is not. Many persons believe, for example, that the world may be ultimately void of real meaning, even as they continue to adhere to the remnants of some traditional belief in intrinsic human dignity.[87] Professor Dworkin's work is an unusually sophisticated example of the pull of an ambivalence and a split of personality more or less consciously felt by many.[88]

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86. *See, e.g.*, KENNEDY, *supra* note 3, at 75 (1997) (referring to Dworkin as "the emblematic modern American legal theorist"); Brian Leiter, *Is There an 'American' Jurisprudence?*, 17 OXFORD J. LEGAL STUD. 367, 369 (1997) (describing Ronald Dworkin as "unquestionably the most influential living legal philosopher in the English-speaking world"); Edward J. McCaffery, *Ronald Dworkin, Inside-Out*, 85 CAL. L. REV. 1043, 1043 (1997) (describing Dworkin as "the preeminent Anglo-American legal philosopher of our time and, quite possibly, of any time"); Richard A. Posner, *Conceptions of Legal "Theory": A Reply to Ronald Dworkin*, 29 ARIZ. ST. L.J. 377, 384 n.24 (1997) (describing Dworkin as "our leading living philosopher of law").

87. *See* Michael J. Perry, *The Gospel According to Dworkin*, 11 CONST. COMMENTARY 163, 181 (1994) ("How do we get from 'the universe is (or might be) nothing but a cosmic process bereft of ultimate meaning' to 'every human being is nonetheless sacred (in the strong or objective sense)'?").

88. For another sophisticated and indeed poignant example, see Larmore, *supra* note 20, at 29-30 (1990) (arguing that if our "deepest," most unshakable convictions are ultimately justifiable by nothing beyond our own particular "way of life," this may amount to an ultimately inadequate approach to imperative morality). *Cf.* Cass R. Sunstein, *The Right to Die*, 106 YALE L.J. 1123, 1145 (1997) (referring to "a culture in which life is seen with a degree of reverence"). Feeling "a degree of reverence" toward the life of, say, the irreversibly comatose may be a curious use of language, but it probably reflects many persons' actual compromised or conflicting feelings.

For many, the ideas of sanctity, of the sacred, or of the inviolable evoke something like, at a very minimum, prohibition or requirement. For Dworkin, however, the inviolable is merely presumptive, prima facie, and defeasible in its remarkably attenuated "inviolability." Sanctity, the sacred, and the inviolable can, Dworkin argues, be "outweighed by other factors."[89] Dworkin believes these considerations always have "positive weight, but can be overridden."[90] In particular, Dworkin concludes that "both sides in the debate about euthanasia share a concern for life's sanctity; they are united by that value, and disagree only about how best to interpret and respect it."[91] More ordinarily, prima facie inviolability would be a contradiction in terms. Given this disagreement about the meaning of inviolability, though, Dworkin concludes that governments may encourage persons to take questions of euthanasia seriously, but must not legally impose any particular view of the sanctity or inviolability of life beyond respecting such rights as may be relevant.[92] The point is of course not whether Dworkin is right or

89. Frances M. Kamm, *Abortion and the Value of Life: A Discussion of Life's Dominion*, 95 COLUM. L. REV. 160, 164 (1994). Thus, inviolability can mean violability. *See* Richard Stith, *On Death and Dworkin: A Critique of His Theory of Inviolability*, 56 MD. L. REV. 289, 313 (1997).

90. Kamm, *supra* note 89, at 164.

91. RONALD DWORKIN, LIFE'S DOMINION 238 (1993).

92. *See* Stith, *supra* note 89, at 314; *see also* Amicus Curiae Brief for Ronald Dworkin et al. at 19, Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (No. 95-1858) ("[A]ny paternalistic justification for an absolute prohibition of assistance to such [terminally ill] patients would of necessity appeal to a widely contested religious or ethical conviction many of them, including the patient-plaintiffs, reject."). Of course, any legal response to the issue of euthanasia must, ultimately, rely on one or more contested principles, at least at the level of rights or liberties, or some other sort of value. Dworkin makes a number of interesting arguments in this context. An element of our life is said, for example, to be of value only if it is endorsed or accepted by us. *See* T.M. Wilkinson, *Dworkin on Paternalism and Well-Being*, 16 OXFORD J. LEGAL STUD. 433, 434 (1996). Thus gifts or abilities we wish we did not have cannot be of value as an element in our life. As well, "[n]one of us wants to end our lives out of character." DWORKIN, *supra* note 91, at 213. This would rule out any number of dramatic, quite reasonable, or quite heroic ways of bringing one's life to a close. Dworkin is arguing, in effect, not just for integrity but for plodding predictability in one's death as well. *See also Glucksberg*, 117 S. Ct. at 2308 (Stevens, J., concurring) (urging "proper recognition to the individual's interest in choosing a final chapter that accords with her life story" (citing DWORKIN, *supra* note 91, at 213)); Eric Rakowski, *The Sanctity of Human Life*, 103 YALE L.J. 2049, 2095 (1994) (quoting DWORKIN, *supra* note 91). Finally, end-of-life decisions should "be made out of our basic responsibility to ourselves." Ronald Dworkin, Euthanasia, Morality, and the Law, Remarks at the Fifth Annual Fritz B. Burns Lecture at the Loyola of Los Angeles Law School (Nov. 22, 1996), *in* 30 LOYOLA (L.A.) L. REV. 1465, 1491 (1997). But why does Professor Dworkin believe that we all have a basic responsibility to ourselves? Where does this basic responsibility come from? All of these claims and asserted rights are of course easily contestable; the trick is to figure out when contestability disqualifies a legal system from relying on a belief and when it does not.

wrong in whatever position he takes on euthanasia. Rather, it is to notice the odd duality of Dworkin's narrow definitions and the broad lingering associations of his chosen terms.

On the idea of the objectivity of any moral principles, it is fair to say that Professor Dworkin's approach is complex. He concludes his most extensive recent discussion of the issue by declaring that some moral beliefs are true or objective, and that to claim otherwise is "false, just bad philosophy."[93] Referring to the idea that there can be some "real" right answers to moral questions, Dworkin proclaims that "[m]y realism . . . knows no bounds."[94] Thus Dworkin seems for a moment to embrace the traditional understanding of moral objectivity.

It turns out, however, that Professor Dworkin's use of terms like "objectivity," "moral realism," and "moral truth" parallels his use of terms like "inviolable," "sacred," and "sanctity." Dworkin does not claim to be a moral objectivist in even roughly the same sense in which Plato and Aristotle, for example, were moral objectivists.[95] He declares that he "would not volunteer the more baroque formulations of that view, about timeless truths among the furniture of the universe. But if pressed I would insist that, so far as they mean anything at all, they are true."[96]

. The latter formulation may suggest both a wariness of, and an inclination to embrace, moral objectivism. Perhaps Dworkin is actually of a divided mind in this respect. But it becomes clear enough that Dworkin does not embrace any standard objectivism. His reference to the "furniture of the universe" may seem to suggest that Dworkin rejects only extremely ambitious, heavily metaphysical forms of objectivism, while accepting other less extremist metaphysical formulae.[97] As it turns out, though, almost all metaphysics

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93. Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 139 (1996). For an equivocal expression of a roughly similar perspective, see THOMAS NAGEL, THE LAST WORD 103 (1997).

> Although it is less clear than in some of the other areas . . ., attempts to get entirely outside of the object language of . . . good and bad, right and wrong, and to see all such judgments as expressions of a contingent, nonobjective perspective will eventually collapse before the independent force of the first-order judgments themselves.

Id. This line of analysis assumes, dubiously, that we can determine the real, rational force of an argument before we decide whether it is merely subjective or not.

94. Dworkin, *supra* note 93, at 128; *see also* Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 361-63 (1997) (arguing for the proposition, among others, that there is no significant difference between calling a practice unjust and calling that practice objectively unjust).

95. *See* sources cited *supra* note 72. Dworkin points out that one can reject any ambitious metaphysical claims, and still offer reasons for one's moral beliefs, e.g., that promise-breaking causes disruption, pain, or distrust, whether people recognize or admit this or not.

96. Dworkin, *supra* note 93, at 128.

97. *Id.*

is classed by Dworkin along with the metaphor of the "furniture of the universe."[98] Almost all metaphysics turns out to be "baroque" and unacceptable. Dworkin can classify himself as an objectivist—even as a strong objectivist—only because, in his view, no more ambitious version of objectivism than his own nonmetaphysical, attenuated version is meaningful and plausible.[99] Why not call oneself a moral objectivist if one is as much of a moral objectivist as it is meaningful to be?[100]

The overall impression of Dworkin's use of this terminology might, one supposes, be one of his moderation in avoiding excessive enthusiasm for speculative metaphysics on the one hand, and excessive skepticism on the other. The lasting impression, however, is not really one of moderation. Instead, one senses that Professor Dworkin is moving, or being pulled, in two opposing directions.[101] At

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98. *Id.*

99. *See id.* at 139; *see also* Benjamin C. Zipursky, *Legal Coherentism*, 50 SMU L. REV. 1679, 1699 (1997) (discussing Dworkin's adoption of the label "moral realism").

100. Thus, we would not say, for example, that we do not really believe in the existence of Australia merely because someone might claim that there is some deeper sense of belief of which we are not capable, or which we find incoherent. But by extension, even the most hard-boiled of us could, in Dworkin's view, be "unicornists," if we believe in unicorns to the fullest extent that it makes sense to believe in unicorns, which is presumably not much. To call a skeptical scientist a "believer in unicorns" based on this logic seems rather misleading.

101. For some sense of this, see Kress, *supra* note 49 (reviewing DENNIS PATTERSON, LAW AND TRUTH (1996)) ("Dworkin is also infamous for simultaneously maintaining some form of modest objectivity . . . while attempting to squirm out of any metaphysical commitments."). Some have attempted to minimize or resolve this ambivalence in Dworkin's thought. One commentator, for example, has argued that

> Dworkin is . . . a moralist who has clung to the thesis that there can be "right answers" even and, indeed, especially, in hard cases. This leads many to conclude that Dworkin is a closet moral objectivist, a believer in natural law, notwithstanding his frequent disclaimer of any personal belief in ghostly specters of abstract rights.
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> The apparent contradiction between an anti-foundational, skeptical method and the optimistic, nonskeptical arguments made out within the method dissolves when we see Dworkin's nonskepticism as an act of political will.

McCaffery, *supra* note 86, at 1059. Despite such resolutions, one is still more struck by the dualities and objective ambivalences in Dworkin's thought than by its unity of spirit. Dworkin, ultimately, is not a "closet moral objectivist." *Id.* However, he urges us, with occasional passion, to believe in moral objectivism. *See* Dworkin, *supra* note 93, at 139. At the end of the day, both accepting and rejecting moral objectivity suggests a certain duality of mind.

Perhaps we should see Dworkin as pulled toward skepticism, but as resisting, not because the most rationally cogent case favors objectivity, but simply "as an act of political will." McCaffery, *supra* note 86, at 1059. One problem is that one's political will to believe in moral objectivity cannot itself be logically justified on any morally objective grounds. That would be question-begging. Someone in Dworkin's position can will himself to believe in moral

a very minimum, Dworkin wants to systematically retain a crucial vocabulary—the standard meanings of which he can no longer endorse. In matters of metaphysics, his positions do not differ crucially from some of the nonobjectivists from which he seeks to distinguish himself.

Dworkin's discussion of euthanasia and assisted suicide in particular would ultimately gain from aspiring to some genuinely objectively better and worse answers. We must not confuse the genuinely objective value of individual liberty, autonomy, or dignity with subjective, ultimately arbitrary preferences regarding the manner of one's own life or death. An arbitrary, subjective preference regarding even one's own death may require no more respect, all else being equal, than an equally intense personal preference regarding flavor of ice cream. A person's preference regarding manner of death deserves serious respect in proportion to its linkage, in one way or another, to individual freedom, autonomy, dignity, and other considerations we will here assume to be objective matters.

This is, of course, not to suggest that the law should typically override even merely subjective, arbitrary personal preferences. There are many moral and practical reasons not to take this course. Even trying to require everyone to eat the same ice cream or root for an assigned team would likely be a disaster. But the strongest case against legally interfering with the choices people make regarding their own death draws crucially on considerations with an objective weight and character, whether we call them matters of the good life or—quite inseparably—of justice and the right. Some of the crucial costs of consistently backing away from aspiring to moral objectivity will be further explored below.

IV. THE SPLIT LEGAL PERSONALITY MEETS MR. HYDE: THE HIGH COST OF GROUP SUBJECTIVISM

The project of trying to have the best of both worlds through an objective approach to the right and a subjective approach to the good has by now collapsed. The right and the good simply cannot be separated in such a way as to make this possible. So why not move on to the popular and more consistent position of across-the-board subjectivism, in our broad sense of the term? The inseparability of

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objectivity in the expectation of some political payoff, but the value of that payoff cannot yet be claimed to be real or objective. So why, in the absence of any morally objective reasons to do so, embrace one political stance rather than another? One's grounds for choosing one set of political principles would have to be arbitrary at that point. If one's political stance at least partially precedes one's (willed) endorsement of moral objectivity, why not start from a premise of enlightened self-interest, rather than some set of more egalitarian premises? Why not adapt to the wishes of the powerful, or those who can dole out benefits and punishments? Why sacrifice unnecessarily, in the absence of any presently objectively binding reason to do so?

the right and the good would pose no real problems if the right and the good are equally subjective.

Believing that the right and the good are both subjective, in our broad sense, certainly avoids a number of problems. We have already seen the popularity of the various forms of subjectivism among persons who think about such things.[102] After a serious cross-examination, however, few of us would be happy with a thorough, consistent subjectivism. This is, of course, a complex matter with many angles.[103] One quick way to cast doubt on consistent subjectivism, though, is to focus on how subjectivism in practice handles the question of rape in general and date rape in particular.

Let us start by asking how the law and the broader society think about rape. When we say that rape is wrong, or that some act should or does count as a rape, what are we really saying? Is this a matter where at least something can be said about right and wrong, justice and injustice, that is really, objectively sounder than some alternative view? Or is what we say about rape ultimately an arbitrary social construct, with the norms and standards to be applied rising no higher than those of the relevant groups with which we identify?

Often, we talk about rape in terms that seem at least to aspire to objectivity. Consider, for example, the Supreme Court case of *Coker v. Georgia*,[104] in which the Court rejected the death penalty for the rape of an adult victim on Eighth Amendment grounds. In *Coker*, Justice White, for the plurality, cautioned that:

> We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy[105] of

102. For a discussion of these camps of subjectivism, see *supra* notes 50-56 and accompanying text.

103. For a brief discussion of one view, see, for example, WRIGHT, *supra* note 70, at 5.

104. 433 U.S. 584 (1977).

105. For a discussion of sexual autonomy in the context of rape, see, for example, Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 L. & PHIL. 35 (1992). It is not clear how much any autonomy theory explains popular attitudes toward rape, or the law of rape. It is, for example, possible to rape persons who are too young to display much autonomy of any sort, who are congenitally unable to display much autonomy, or who are now permanently unable to display much autonomy because of some disease or disability. *See* Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315. Does the moral gravity of the rape, all else being equal, track the degree to which the victim at one time had, might develop, or might but for the rape have developed a capacity for autonomy? Note in particular that the rape of a child is sometimes considered worse than the rape of a typically more autonomous adult. *See, e.g.*, State v. Wilson, 685 So. 2d 1063, 1066 (La. 1996), *cert. denied sub nom.* Bethley v. Louisiana, 117 S. Ct. 2425 (1997).

> the female victim and for the latter's privilege[106] of choosing those with whom intimate relationships are to be established. Short of homicide, it is the "ultimate violation of the self."[107]

It is possible to say all this, but to mean it only in a merely subjective or group-relative sense. But that is not, in context, the natural reading here. Justice White is not trying merely to articulate some community code. At the very least, we can assume that Justice White would not have said all this, meaning it only in some subjective sense, unless he had hoped as well to borrow some of the rhetorical force that identical language, intended as objective truth, might carry.

We do not, however, always talk about rape—either its scope or its moral character—in language that so evidently makes claims to moral objectivity. Often, we think of the scope or severity of rape in terms that seem to rise no higher than our group identifications, group affiliations, and group interests. Let us briefly explore this group relativism regarding rape, and then decide whether it is an encouraging, progressive development.

As a culture, we have collectively a split personality with regard to the scope or definition of rape. Sometimes, this is referred to in the language not of a collectively split personality, but of a paradox. It has thus been observed that:

> An apparent paradox exists among American young people with regard to rape. On the one hand, rape is consensually viewed as an abhorrent form of interpersonal violence. On the other hand, many young people do not believe that forced sex between acquaintances and intimates is particularly wrong or problematic and they do not think that there is such a thing as rape between acquaintances and intimates.[108]

In the latter view, acquaintance rape is not real rape. This view is held not just by many young and nonyoung persons, but commonly by official representatives of the legal system.[109]

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106. It is unclear why Justice White's opinion here adopts the language of privilege rather than of right. A legal or moral right does not descend to the level of a privilege merely because the right is feloniously violated.

107. 433 U.S. at 597 (footnotes added) (quoting U.S. DEP'T OF JUSTICE LAW ENFORCEMENT ASSISTANCE ADMIN., RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FACILITIES, AND CRIMINAL JUSTICE AGENCIES 1 (1975)). For an argument to the contrary—that rape is a serious crime, but not a *very* serious crime (perhaps comparable in gravity to a severe beating)—see Michael Davis, *Setting Penalties: What Does Rape Deserve?*, 3 L. & PHIL. 61, 62-63, 78 (1984).

108. Jacquelyn W. White & John A. Humphrey, *Young People's Attitudes Toward Acquaintance Rape*, *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 43, 43 (Andrea Parrot & Laurie Bechhofer eds., 1991).

109. *See* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1092 (1986).

> Where less force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other, where the setting is not an alley but a bedroom, where the initial contact was

Rape is thus not simply an act of conscious trangressivism or rare mental illness.[110] Rape is instead often either excused or defined out of existence, in some contexts, by particular mainstream segments or groups. Some groups, certainly, define rape broadly and condemn it strenuously. Others, however, simply do not. Particular groups, however constituted, thus think of rape in dramatically different ways.

The roughest way to construct a group-relativist or a subjectivist understanding of rape would be simply to distinguish crudely between stereotypical men and women. Men would have certain interests, and therefore certain group-based understandings of rape, and women would have largely different interests, and therefore other group-based understandings of rape. Each group might, to varying degrees, be able to point out inconsistencies in the other's view. But it would, in a subjectivist view, be absurd to say that either view was "really" better or nearer "the truth" than the other. These stereotypic men and women would instead simply have different, perhaps incommensurable, value schemes.

Does this disturbing picture bear any relation to reality? A crude gender-group breakdown of course grossly oversimplifies matters. But to some degree, it reflects current social reality for many persons. The social science evidence suggests, for example, that many men and women tend to interpret differently the meaning of dating behavior and other social behavior.[111] What women may perceive as friendliness, men tend more to perceive as sexual interest.[112] Men tend to discern sexual invitation where women do not.[113] Men see more behaviors as still permissible after a verbal refusal of

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> not a kidnapping but a date, where the woman says no but does not fight, . . . the law . . . often tell[s] us that no crime has taken place . . . .

Id.

110. *See* Tanja H. v. Regents of the Univ. of Cal., 278 Cal. Rptr. 918, 924 (Cal. Ct. App. 1991) ("'[T]he locus of violence against women rests squarely in the middle of what our culture defines as "normal" interaction between men and women.'") (quoting Allan Griswold Johnson, *On the Prevelance of Rape in the United States*, 6 SIGNS 136, 146 (1980)); Laurie Bechhofer & Andrea Parrot, *What Is Acquaintance Rape?*, *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 9, 20 (Andrea Parrot & Laurie Bechhofer eds., 1991).

111. *See* WHITE & HUMPHREY, *supra* note 108, at 52 ("[Y]oung women and men frequently perceive the same dating circumstances differently."); VERNON R. WIEHE & ANN L. RICHARDS, INTIMATE BETRAYAL: UNDERSTANDING AND RESPONDING TO THE TRAUMA OF ACQUAINTANCE RAPE 78 (1995) ("[M]en tend to view the world from a more sexual perspective than do women.").

112. *See* WIEHE & RICHARDS, *supra* note 111, at 78.

113. *See* ROBIN WARSHAW, I NEVER CALLED IT RAPE 41-42 (1988).

consent than women do.[114] When date rape occurs, young men are more inclined than women to blame the rape victim.[115]

These differences do not amount to merely a harmless relativism. Depending on the degree of bluntness with which the question is posed, substantial percentages of young men admit to some likelihood that they would perpetrate what would amount to a rape if they could be assured of not being caught or prosecuted.[116] Significant numbers of young persons believe that it is appropriate to impose sex forcibly on a woman under various common circumstances, including a long-term dating relationship or when spending "a lot of money" on the woman.[117]

These striking beliefs about rape are not confined to males. To at least some limited degree, young women may subscribe to similar beliefs.[118] Such beliefs may be contrary to the obvious interests of women, but it is hardly unprecedented for particular groups to internalize norms that undermine their own interests. Young men and women in our culture are often not sexually segregated for socialization purposes, and they may to some extent influence one another's norms and beliefs. Beliefs about rape for one or both groups seem, however, to be associated with factors such as the degree of hostility borne toward women[119] and a view of male-female relation-

114. *See* Bechhofer & Parrot, *supra* note 110, at 22.

115. *See* WARSHAW, *supra* note 113, at 42-43; Patrick J. Harrison et al., *Date and Acquaintance Rape: Perceptions and Attitude Change Strategies*, 32 J.C. STUDENT DEV. 131, 138 (1991).

116. *See* Charlene L. Muehlenhard et al., *Definitions of Rape: Scientific and Political Implications*, 48 J. SOC. ISSUES 23, 39-40 (1992); White & Humphrey, *supra* note 108, at 48 (pointing out "that about 35% of male college students reported some willingness to rape if they were assured of not getting caught").

117. Bechhofer & Parrot, *supra* note 110, at 22.

118. *See id.*; *see also* Roseann Hannon et al., *College Students' Judgments Regarding Sexual Aggression During a Date*, 35 SEX ROLES 765, 766 (1996) (discussing study where only 52.2% of the participants identified intercourse combined with both physical and verbal resistance as rape); Barbara E. Johnson et al., *Rape Myth Acceptance and Sociodemographic Characteristics: A Multidimensional Analysis*, 36 SEX ROLES 693, 706 (1997) (concluding that "[m]ales and those upholding traditional gender role beliefs were more likely to accept certain myths that blame the woman"); Beverly A. Kopper, *Gender, Gender Identity, Rape Myth Acceptance, and Time of Initial Resistance on the Perception of Acquaintance Rape Blame and Avoidability*, 34 SEX ROLES 81, 90-91 (1996) (concluding victims of acquaintance rape are likely to blame themselves); White & Humphrey, *supra* note 108, at 47 (citing a large study of 11-14 year olds in which "31% of the boys and 32% of the girls said it is not improper for a man to rape a woman who had past sexual experiences" and "65% of the boys and 47% of all of these seventh-to-ninth graders said it is OK for a man to rape a woman he has been dating for more than six months").

119. *See* Bruce McCollaum & David Lester, *Sexual Aggression and Attitudes Toward Women and Mothers*, 137 J. SOC. PSYCHOL. 538, 539 (1997) (concluding respondents' sexual aggressiveness was "associated with participants' negative attitudes toward their own mothers and toward women in general").

ships as basically manipulative or adversarial.[120] This group adversarialism, in which men and women are assumed to be "opaque to the other's understanding,"[121] is the most obvious form of group-relativism regarding rape.

It is certainly possible to say that selecting these crude, rather ad hoc belief groups, cutting across gender lines as they do, does not fairly test the ability of group relativism or other forms of subjectivism to address rape issues. We can admit that the problems of rape would be reduced if the world were constituted solely by, to choose from myriad possibilities, Gandhians and de Beauvoirians. If everyone fell into one of these two camps, and long retained the substantive norms and views of their namesakes while still being group relativists, group relativism would have much appeal. These hypothetical groupings of consistent relativists, however, do not match actual belief groups regarding date rape. This is not to claim that switching away from a belief that rape can be wrong only for group-relative reasons toward a belief in the real wrongness and breadth of rape would quickly transform social life. But such a switch seems a necessary part of any real progress.

Surely the most appealing approach would be a mutual abandonment of group relativism in favor of pursuing mutual understanding and genuine communication.[122] Genuine communication is surely best understood in objective terms, as opposed to "genuine" communication according to the standards of only one group, but not the other.[123] And genuine communication is valuable, at least in

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120. *See* Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCHOL. 217, 218, 229 (1980). For Burt,

> [a]dversarial sexual beliefs refers to the expectation that sexual relationships are fundamentally exploitative, that each party to them is manipulative, sly, cheating, *opaque to the other's understanding*, and not to be trusted. To a person who holds this view of male and female sexuality, rape might seem the extreme on a continuum of exploitation, but not an unexpected or horrifying occurrence, or one justifying sympathy or support.

Id. at 218 (emphasis added). For further reference to Burt's study, see, for example, LARRY BARON & MURRAY A. STRAUS, FOUR THEORIES OF RAPE IN AMERICAN SOCIETY: A STATE-LEVEL ANALYSIS 6 (1989); Patricia L.N. Donat & John D'Emilio, *A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change*, 48 J. SOC. ISSUES 9, 17 (1992).

121. Burt, *supra* note 110, at 218.

122. *See* Lois Pineau, *Date Rape: A Feminist Analysis*, 8 L. & PHIL. 217, 236, 240 (1989); *see also* Maya Manian, *Rethinking Rape*, 20 HARV. WOMEN'S L.J. 333 (1997) (reviewing DATE RAPE: FEMINISM, PHILOSOPHY, AND THE LAW (Leslie Francis ed., 1996)); Lois Pineau, *Date Rape: A Feminist Analysis*, *in* DATE RAPE: FEMINISM, PHILOSOPHY, AND THE LAW 1 (Leslie Francis ed., 1996).

123. Much of the work by Jürgen Habermas can be described as using the idea of genuine communication to reach agreement on basic norms that at least minimally transcend mere group preference or group interests. *See, e.g.*, JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., MIT Press 1996) (1992).

part, for objective reasons, and not merely because a group with which one happens to identify happens to value it.

The mentality of group-relative norms has thus manifested itself quite unappealingly in the context of rape. There are, however, more appealing, more objectivist alternatives. Consider, for example, the vision of Martha Burt:

> Only by promoting the idea of sex as a mutually undertaken, freely chosen, fully conscious interaction, in contradistinction to the too often held view that it is a battlefield in which each side tries to exploit the other while avoiding exploitation in turn, can society create an atmosphere free of the threat of rape.[124]

Surely we would want to see this as genuinely worth striving for, rather than as merely the vision of some group with which we might or might not identify.[125]

CONCLUSION

We have identified and explored some of the most important dimensions of what we have diagnosed as the split legal personality. As it turns out, these three aspects of our split legal personality all have understandable motivations. We can appreciate why the various splits developed. But we have also recognized that these dualisms are untenable and ultimately unappealing. At work in all three of these unfortunate splits is an unduly severe distrust of the idea that some legal and moral principles can be genuinely better than others, an idea that is increasingly rejected in sophisticated ways. It is, admittedly, easy to distrust or reject the very idea of any objective truth given its history of abuse. As it happens,

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124. Burt, *supra* note 110, at 229.

125. This is of course not to argue that distinctive group perspectives cannot contribute to an overall understanding of rape. Quite the opposite. It is hardly an exaggeration to say that our best overall understanding is usually an accretion and synthesis of distinctive group perspectives. People think and perceive, typically, within various narrow and broad group perspectives. This is not to suggest, however, that every claim about rape and its morality that can be linked to some group's perspective is equally valid and equally worthy of embodiment in the law. *See* People v. Rhines, 182 Cal. Rptr. 478, 484 (Cal. Ct. App. 1982) (finding that "[t]o allow a race or any group to set up for itself standards of conduct and reasonableness to apply to nonconsenting individuals in the context of rape is a concept that is unthinkable in our society"); *see also* State v. Lee, 494 N.W.2d 475, 480 (Minn. 1992) (noting that "the clear purpose of the testimony of defendant's expert was to convey the impression that in the Hmong community the complaints by A and B were not considered credible because Hmong women who have been raped do not act, post-rape, as these complainants did"); State v. Her, 510 N.W.2d 218, 221 (Minn. Ct. App. 1994) (noting that "[t]he apparent differences between Hmong and American cultures in their treatment of rape, adultery, and female sexuality were a major element of the trial").

though, this distrust and rejection of objectivity is itself a genuinely bad idea. Abuse of the idea of objectivity can be reduced. In practice, rejecting the aspiration to objectivity neither promotes personal autonomy nor serves the interests of groups chronically victimized by others. The oppressed have, almost by definition, the greatest need and the best reason to appeal to objective truth.